

ORIGINAL

UNDER HIS DIRECTION, INC.



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September 30, 1996

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OCT 1 - 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

Honorable Edward Luton  
Administrative Law Judge  
Federal Communications Commission  
2000 L Street, N.W.  
Washington, D.C. 20554

Dear Judge Luton:

DOCKET FILE COPY ORIGINAL

It is now 9:05 pm CDT, and I am typing this letter to fax to your office first thing tomorrow morning, October 1.

The reason for the delay is that I was detained on business in Houston, Tx., all day today and only arrived home about 7:00pm tonight. My delay was unforeseen and could not be prevented.

Please accept my delay in filing this information. I could not get to my home before 4:30 eastern time.

I will once again be in Houston this morning and probably late into the day. If I am needed my wife can reach me at the business office where I will be.

I sincerely appreciate your indulgence and understanding in this matter.

With Regards,

Mark A. Peterson  
President  
Under His Direction, Inc.

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Eph. 4:16

"...under HIS direction the whole body is fitted together perfectly, and each part in its own special way helps the other parts, so that the whole body is healthy and growing and full of love." L.B.

shelter • communication

food • clothing

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of ) MM Docket No. 96-70  
 )  
UNDER HIS DIRECTION, INC. )  
 )  
Order to Show Cause Why the )  
License for Station KUHD(AM) )  
Port Neches, Texas Should )  
Not Be Revoked )

To: Honorable Edward Luton  
Administrative Law Judge

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OCT 11 - 1996

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

REPLY FINDINGS OF FACT  
AND CONCLUSIONS OF LAW OF  
UNDER HIS DIRECTION, INC.

Under His Direction, Inc. ("UHD"), pursuant to § 1.263 of the Commission's Rules, submits its Reply Findings of Fact and Conclusions of Law in the above-captioned proceeding. As will be shown below, the Proposed Findings of Fact and Conclusions of Law filed by the Mass Media Bureau ("MMB") in this proceeding misstate three critical matters of record, which the MMB uses to support its erroneous conclusion that UHD must forfeit its license.

**The Status of UHD's Assets**

First, the MMB incorrectly recounts UHD's actions between the grant of its initial request for Special Temporary Authority ("STA") for KUHD to go silent and its first request for extension of STA. Specifically, although it may be correct that the Station's assets at the transmitter site were seized on February 28, 1995, and "sold" at public auction, UHD did not need to secure funds to acquire new equipment as the MMB incorrectly alleges. (MMB PF ¶ 7.) Rather, Janet Chance, UHD's transmitter

site landlord, purchased UHD's transmitter site assets and advised UHD that she would cooperate in the use and/or acquisition of those assets by any party UHD might find to assist it in returning the Station to the air. (UHD PF pp.2,3.) Those assets therefore remained available to UHD.

Indeed, the MMB also incorrectly states that as of January 28, 1996, "UHD had no assets which it could use to resume broadcast operations of KUHD(AM)." (MMB PF ¶ 12.) As in the case of its transmitter site, the landlord of UHD's studio site foreclosed on UHD's property with the understanding that such assets would be made available to UHD once it or another party was ready to return the Station to the air. Indeed, UHD asked McKee Towers to foreclose so that CCC or another creditor could not foreclose on the assets at the studio site. (Tr.73.) UHD thus acted to protect its assets from creditors so that they would remain available for assignment or lease to a third party. (Tr.73-74.)

In sum, UHD reached understandings with its studio and transmitter landlords which both provided a measure of security to the landlords and assured UHD of access to the equipment so that it could return KUHD to the air, as it has always intended. UHD did not lose or abandon the Station's equipment as the MMB suggests. UHD found the most practical way to protect and maintain access to the equipment to allow for the Station's return to the air.

#### **UHD Did Not Instigate Preparation of the Conveyance**

Second, the MMB misstates the facts of record concerning the preparation of the Conveyance in Lieu of Foreclosure ("Conveyance") and thereby mischaracterizes UHD's efforts to return KUHD to the air. UHD purchased the Station from the Church of the Christian Crusade ("CCC") and signed a promissory note in favor of CCC as part of the purchase price. After UHD filed for the STA due to its financial hardship, UHD approached CCC about taking the Station back. It was CCC, however, which suggested the terms of and prepared the Conveyance. (UHD PF p.3.) After CCC drafted the Conveyance, CCC transmitted it to UHD and requested that UHD sign the Conveyance and return the signed original to CCC. Once UHD returned the signed Conveyance to CCC, UHD was not in a position to simply "withdraw the document it had submitted to CCC." (MMB PF at ¶ 11.) UHD had no reason to believe that CCC had failed to execute CCC's own document and believed that any attempt to withdraw or renege on the agreement would have been a clear breach of contract, subjecting UHD to liability. (UHD PF pp.4,5.) UHD cannot be faulted for failing to predict that CCC would renege on the Conveyance CCC itself had prepared and asked UHD to sign. (UHD PF p.3.)<sup>1</sup>

**UHD has the Intent and Capability to Return KUHD to the Air**

Finally, the MMB's submission incorrectly states that UHD's past failure to return KUHD to the air was intentional, so that

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<sup>1</sup> In fact, after UHD had executed CCC's Conveyance, the principals of Vision Latina, Inc. contacted UHD about acquiring the Station, but UHD turned down their offer because it felt it was obligated under the Conveyance. (UHD Ex. 1, p.2; UHD Ex.2, p.1.)

its present promise to do so cannot be trusted. (MMB CL ¶ 2.) This argument by the MMB is not relevant and in any event, is contrary to the record evidence.

The first issue designated against UHD in this proceeding concerns whether UHD "has the capability and intent to expeditiously resume" the operations of the Station. As written, the issue contemplates only UHD's present intent.<sup>2</sup> The record evidence demonstrates UHD's present plans to resume the operations of KUHD expeditiously.

Specifically, UHD and Vision Latina, Inc. ("Vision") have placed an application to assign the KUHD license to Vision before the Commission for processing.<sup>3</sup> In addition, UHD and Vision have discussed entering into a Time Brokerage Agreement ("TBA") following a decision by the Presiding Judge not to revoke the KUHD license. (UHD PF p.8.) The Assignment Application reports that the Station's equipment has been inspected and that the Station could be returned to the air within sixty days. (*Id.*) UHD has always had the intent to return the Station to the air, and it now, with Vision's assistance, has the capability.

Even if its past conduct is examined, the record shows that UHD has acted diligently and in a forthcoming matter with the FCC. In its initial request to take KUHD dark, UHD reported its "extreme financial hardship." UHD explained that it was seeking

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<sup>2</sup> Compare the language of the first issue with the language of the second issue which questions whether UHD has violated Sections 73.1740 and 73.1750 of the Commission's Rules. The second issue clearly concerns itself with UHD's past conduct.

<sup>3</sup> FCC File No. BAL-960524EH ("Assignment Application").

alternative sources of financing and working with another church organization to return KUHD to the air. (MMB Ex.1, Attachment 1.) All of this was true.

When UHD later was unable to conclude negotiations and return KUHD to the air prior to the expiration of the STA, it filed an extension of STA request. In the extension request, UHD reported to the Commission the status of its efforts to return KUHD to the air.

UHD reported that it had reached an agreement with CCC, which UHD reasonably expected the parties to consummate shortly. (MMB Ex.1, Attachment 4.) UHD even provided the Commission with a copy of the documents memorializing its agreement with CCC, something it was not required to do, but that it elected to do in order to keep the Commission fully informed of its progress. (Id.) UHD could not have known that CCC would elect not to perform on an agreement which CCC, itself, had drafted and submitted to UHD for UHD's approval. CCC's breach of the Conveyance was unforeseeable and beyond UHD's control.<sup>4</sup> Despite this setback, UHD continued in its efforts to return KUHD to the air.

UHD first learned of CCC's decision to renege on the Conveyance on or about January 28, 1996. (UHD PF p.5.) UHD immediately called the FCC to seek advice. Following its conversations with the Commission on January 30, 1996, UHD resumed its efforts to return the Station to the air by

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<sup>4</sup> Absent his good faith belief, UHD would have executed the contract with Vision earlier.

contacting Vision's principals to determine if they remained interested in purchasing the Station. (UHD PF pp.4,5.)

UHD and Vision promptly commenced negotiations, and prior to this case being designated for hearing, UHD had reached an agreement with Vision to acquire the KUHD license. Vision had made arrangements with UHD's studio and transmitter site landlords concerning the Station equipment at the two sites. (UHD PF p.7.)<sup>5</sup> The Assignment Application would have followed more quickly but for the issuance of the HDO that commenced this hearing.

The MMB wrongly states that the only way UHD will be able to return KUHD to the air is by way of FCC grant of its pending application to assign the KUHD license to Vision. Based on that false statement, the MMB concludes that because of its policy not to process applications filed by silent stations that have been designated for hearing, UHD will never be able to return KUHD to the air. The two problems with the MMB's argument are: (1) UHD and Vision have discussed entering a TBA following a favorable decision from the Presiding Judge which would allow KUHD to return to the air prior to grant of the pending Assignment Application and (2) the MMB offers no justification or citation for its "policy" of not processing applications filed by silent stations which have been designated for hearing.

Until now, it has been the MMB's practice to grant

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<sup>5</sup> The fact that Vision was able to so quickly enter into agreements with UHD's studio and transmitter landlords further undercuts that MMB's allegations that the Station's assets were not available to UHD.

assignment applications to allow silent stations to return to the air. See Video Marketing Network, Inc., 7 FCC Rcd 7611 (MMB 1995). This practice is so fundamental to the MMB's way of thinking that when Congress mandated that stations silent more than twelve months would automatically have their licenses cancelled, the FCC issued a Public Notice stating that it would provide expedited consideration to any application that would assist a silent station's return to the air before the twelve month deadline. See Public Notice on Procedures to Expedite Processing of Silent Broadcast Applications, DA 96-818, released May 22, 1996 ("Public Notice"). The MMB has never explained why, contrary to its policy in Video Marketing, supra, and the Public Notice, it is not processing UHD's Assignment Application. More importantly, the MMB has failed to explain why silent stations designated for hearing will not be afforded the same expedited consideration of applications offered to all other silent stations under the Public Notice.<sup>6</sup>

The return of KUHD to the air is not a false hope...unless the MMB is allowed to execute its plan to sabotage all of the efforts UHD has made to return KUHD to the air. UHD always intended to return the Station to the air. It has demonstrated continued diligence towards that end. UHD promptly entered into the Conveyance with CCC and, had CCC performed as it had agreed

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<sup>6</sup> If the policy has been changed so that licensees can not approach the FCC at the eleventh hour, after designation, with modification and/or assignment applications, the policy still should not apply to UHD because of its pre-designation diligence.



to, this hearing would not have been necessary. CCC's unforeseeable conduct forced UHD to find a new buyer, which it did as soon as it could after learning CCC was reneging on the Conveyance which CCC had drafted. UHD now has the Assignment Application before the Commission.

The MMB should be processing that Assignment Application consistent with its policy set forth in the recent Public Notice and its decision in Video Marketing, and Vision should be allowed to return Port Neches' only local broadcast outlet to the air. However, in a total and unexplained departure from established policy, the MMB is threatening the future of KUHD by deliberately not processing the Assignment Application. The MMB appears to be eager to have KUHD "die by procedure" on February 9, 1997.

It is for this reason that UHD requests expedited consideration and release of an Initial Decision in its favor in this proceeding. The MMB has indicated its desire to do whatever it takes, even unannounced policy changes, to keep KUHD from returning to the air. If the MMB keeps KUHD's license tied up in litigation until February 9, 1997, then the KUHD license will cancel automatically. Even with a favorable Initial Decision, UHD would have only until February 9, 1997 in which to return KUHD to the air, and the MMB will have appeal rights, so that a prompt Initial Decision is necessary for any hope to return KUHD to the air.

UHD has demonstrated diligence in its efforts to return KUHD to the air and has at all times been forthcoming with the FCC. No evidence of misrepresentation or an intent to deceive has been

introduced by the MMB against UHD. Whatever violation of Section 73.1740 of the Rules UHD might have committed, certainly its fifty-six days of silence without authorization should not result in cancellation of the KUHD license.<sup>7</sup> Certainly, in a revocation proceeding, the burden on the MMB must be to introduce something more than fifty-six days of station silence without authorization. Case law, policy and equity all line up squarely in favor of a decision resolving issues 1 and 3 in favor of UHD. The MMB has not demonstrated UHD's violation of Section 73.1750 of the Rules. UHD concedes that it did violate Section 73.1740 of the Rules, in the circumstances of this case, but such violation certainly cannot justify revocation of UHD's license.

#### **Conclusion**

The MMB has failed to meet its burden of proof and proceeding on the issues designated in this case. The rule violations committed by UHD do not rise to the level of revocation. UHD has been forthcoming with the FCC and diligent in its efforts to return KUHD to the air. CCC's decision to renege on the Conveyance it had crafted was unforeseeable. UHD's response to CCC's actions was immediate and resulted in a concrete plan to return KUHD to the air.

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<sup>7</sup> The fifty-six days is measured from the date UHD's STA expired until the day the HDO in this matter was issued. UHD has a request for reinstatement and extension of STA pending, but the MMB has, contrary to its own established policy, elected not to process that request either.

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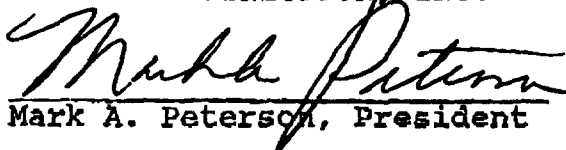
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WHEREFORE, it is respectfully requested that the Presiding Judge issue an Initial Decision resolving all issues in favor of Under His Direction, Inc.

Respectfully submitted,  
UNDER HIS DIRECTION, INC.

By:

  
Mark A. Peterson, President

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September 30, 1996

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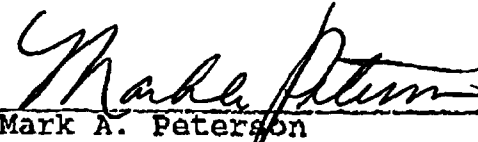
P.12/12

CERTIFICATE OF SERVICE

I, Mark A. Peterson, do hereby certify that I caused a copy of the foregoing "Reply Findings of Fact and Conclusions of Law" to be hand delivered, this 1st day of October, 1996 to each of the following:

\* Robert Zauner, Esq.  
Hearing Branch  
Audio Services Division  
Federal Communications Commission  
2025 M Street, Room 7217  
Washington, D.C. 20554

\* Honorable Edward Luton  
Administrative Law Judge  
Federal Communications Commission  
2000 L Street, N.W., Room 225  
Washington, D.C. 20554

  
Mark A. Peterson

\* Hand Delivery

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